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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 161.

FRANCIS J. KING, WILSON W. GRIFFITH, RUSSELL C. DANIELS. JAMES R. STRONG, EDWARD BISSELL, EXECUTOR OF FREDERICK BISSELL, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 25, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 161.

FRANCIS J. KING, WILSON W. GRIFFITH, RUSSELL C. DANIELS, JAMES R. STRONG, EDWARD BISSELL, EXECUTOR OF FREDERICK BISSELL, DECEASED, PLAINTIFFS IN ERROR,

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1 THE UNITED STATES OF AMERICA,
Northern District of Ohio:

At a stated term of the circuit court of the United States, within and for the northern district of Ohio, begun and held at the city of Cleveland, in said district, on the first Tuesday in October, being the fifth day of said month, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the one hundredth.

Present, the honorable Martin Welker, district judge.

Among the proceedings then and there had were the following, to wit:

THE UNITED STATES *vs.* HARRY CHASE, FRANCIS J. KING, WILLSON W. GRIFFITH, Frederick Bissell, Russell C. Daniels, James R. Strong, & Edward Bissell, as executor.	2605.	Law.

Be it remembered that heretofore, to wit, on the 12th day of August, A. D. 1874, came the district attorney on behalf of the United States, and filed in the clerk's office of said court a certain petition and precipe, which petition and precipe are in the words and figures following, to wit:

Petition.

In the circuit court of the United States for the northern district of Ohio.

THE UNITED STATES *v.* HARRY CHASE, FRANCIS J. KING, WILLSON W. GRIFFITH, Frederick Bissell, Russell C. Daniels, James R. Strong & Edward Bissell, as executor, &c.	Petition for money only.

2 The United States, plaintiff, by George Willey, its attorney, complains of the above-named defendants, and says that the said defendants on the 20th day of April, A. D. 1866, at Toledo, in said district, and within the jurisdiction of this court, by their bond and writing obligatory, bearing date the day and year last aforesaid, sealed with the seals of the said defendants, and here to the court now shown, became held and firmly bound unto the said plaintiff in the sum of one hundred thousand dollars ($100,000), to be paid to the said plaintiff, for the payment whereof the said defendants above-named bound themselves, their heirs, executors and administrators, jointly and severally by those presents.

2. That said writing obligatory was, and is, subject to a certain condition thereunder written whereby, after reciting to the effect that whereas the President of the United States had appointed the said Harry Chase collector of taxes under an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," it is provided that if the said Harry Chase shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and

every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the said obligation to be void, otherwise to remain in full force and virtue, as by said writing obligatory will more fully appear.

3. And the said plaintiff, for assigning a breach of said condition of said writing obligatory, in fact, says that, after the making of
3 said writing obligatory, to wit, on the 1st day of June, A. D. 1867, the said Harry Chase had received into his hands and possession, as public moneys, the same being taxes paid to said Harry Chase as collector by the Toledo, Wabash, & Western Railway Company upon interest maturing on bonds and other evidences of indebtedness of said railway company during the months of January, February, March, April, and May of said year last mentioned, the sum of twenty-four thousand nine hundred and twenty-three & $\frac{87}{100}$ dollars ($24,923.87), all of which public moneys the said Harry Chase, collector as aforesaid, did fail to account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, but, on the contrary, retained the same in his hands and possession, and refused and still refuses to pay the same to the United States, as, by the terms of the condition of said writing obligatory he was bound to do, whereby the said writing obligatory became forfeited, and the said plaintiff hath sustained damages to a large amount, to wit, to the amount of $24,923.87, with interest from said June 1st, 1867, and thereby an action hath accrued to have and demand of and from the said defendants the sum of one hundred thousand dollars above mentioned, yet the said defendants have not, nor have either of them paid said sum of one hundred thousand dollars, or any part thereof, but have refused, and do still refuse, to the damage of plaintiffs one hundred thousand dollars; wherefore plaintiff brings its suit.

GEO. WILLEY,
U. S. Attorney.

4 NORTHERN DISTRICT OF OHIO, *ss:*

Henry S. Sherman, being duly sworn, says that he is ass't U. S. attorney for said district, and is informed and believes that the above petition is true.

HENRY S. SHERMAN.

Subscribed and sworn to before me by the said Henry S. Sherman *before me* this 12th day of August, A. D. 1874.

CHA'S H. BILL,
Deputy Clerk.

Precipe.

THE UNITED STATES
v.
HARRY CHASE, FRANCIS J. KING, WILSON W. GRIFFITH, FREDERICK BISSELL, RUSSELL C. DANIELS, JAMES R. STRONG. } Precipe.

Issue summons to above-named defendants returnable according to law; amount of penalty, $100,000; amount claimed, $24,923.87, with interest from June 1st, 1867.

GEO. WILLEY,
U. S. Att'y.

And thereupon there was duly issued herein, by the clerk of said court, a certain writ of summons, which is in the words and figures following, to wit:

5, 6 *Summons.*

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, greeting:

You are hereby commanded to notify Harry Chase, Francis J. King, Wilson W. Griffith, Frederick Bissell, & James R. Strong, that they have been sued by the United States in the circuit court of the United States within and for the said district, and that unless they answer by the 19th day of September, A. D. 1874, the petition of the said plaintiff against them, filed in the clerk's office of said court at Cleveland in said district, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 24th day of August, A. D. 1874.

Witness the honorable M. R. Waite, Chief Justice of the United States, this 12th day of August, A. D. 1874, and in the 99th year of the Independence of the United States of America.

[SEAL.] EARL BILL, *Clerk.*
By CHA'S H. BILL, *Deputy Clerk.*

7 *End'st on sum's.*

Said summons was endorsed, "Summons in action for the recovery of money only; amount of penalty, $100,000. Am't claimed, $24.923.87, with interest from June 1st, 1867. Geo. Willey, U. S. att'y."

And afterwards, to wit, on the 18th day of August, A. D. 1874, said summons was returned to said clerk's office, endorsed as follows, to wit:

Return.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 15th day of August, A. D. 1874, I made due service of this writ at Toledo, Ohio, by delivering a true copy thereof duly certified to each of the within named Harry Chase, Wilson W. Griffith, Russell C. Daniels & James R. Strong, and by leaving a true copy thereof duly certified at the usual place of abode of the within named Francis J. King, in the hands of Samuel Scink, a white member of his family, the said F. J. King being absent from home.

The within named Frederick Bissell has been dead about four years; not served.

N. B. PRENTICE, *U. S. Marshal,*
By M. C. O'CONNOR, *Dep.*

And afterward, to wit, on the 5th day of September, A. D. 1874, there was duly filed herein in said clerk's office a certain amended petition, which is in the words and figures following, to wit:

Amended petition.

In the circuit court of the United States, northern district of Ohio.

THE UNITED STATES
vs.
HARRY CHASE, FRANCIS J. KING, WILSON W. Griffith, Russell C. Daniels, James R. Strong, and Edward Bissell, executor of the last
8 will of Frederick Bissell, deceased. } Amended petition.

The United States, plaintiff, by George Willey, its attorney, complains of the above-named defendants, and says:

1st. That the said Harry Chase, Francis J. King, Willson W. Griffith, Russell C. Daniels, James R. Strong, and Frederick Bissell, now deceased, and of whom the said Edward Bissell is executor, in the life-time of the said Frederick Bissell, on the 20th day of April, 1866, at Toledo, in said district, and within the jurisdiction of this court, by their joint and several bond and writing obligatory, bearing date the day and year aforesaid, sealed with the seal of the said defendants, and here to the court now shown, became held and firmly bound unto the said plaintiff in the sum of $100,000, to be paid to the said plaintiff, to the payment whereof the said defendants above named jointly and severally bound themselves, their heirs, executors, and administrators, firmly by these presents.

2. That said writing obligatory was and is subject to a certain condition thereunder written, whereby after reciting to the effect that the President had appointed the said Harry Chase collector of taxes under an act entitled "An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes," it is provided that if the said Harry Chase shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of
9 the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the said obligation to be void, otherwise to remain in full force and virtue in law. And said plaintiff, for assigning a breach of said condition of said writing obligatory in fact says, that after the making of said writing obligatory, to wit, on the 1st day of June, 1868, the said Harry Chase had received into his hands and possession as public moneys, the same being taxes paid to said Harry Chase, as collector, by the Toledo, Wabash and Western Railroad Company, upon interest maturing on bonds and other evidences of indebtedness of said railroad company during the months of August, October, and November, of the year 1867, the sum of $24,823.87, all of which public moneys so received by the said Harry Chase, collector as aforesaid, he, the said Harry Chase, collector, did fail to account for and pay over to the United States in compliance with the orders and regulations of the Secretary of the Treasury, but on the contrary retained the same in his hands and possession, and has refused, and still refuses to pay the same.

4. And for a further breach of said condition plaintiff says, that after the making of said writing obligatory, to wit, on the 1st day of May, 1868, the said Harry Chase, as collector, had received into his hands and possession the sum of $100, the same being public moneys received

10 by him as such collector, as taxes under the internal-revenue laws of the United States, which said sum, being then public moneys as aforesaid, the said Harry Chase failed to account for and pay over to the United States, but on the contrary retained the same in his hands, and refused, and still refuses to pay the same to the United States.

Whereby and by reason of the premises aforesaid the said bond and writing obligatory has become forfeited to the United States, and the said plaintiff hath, by reason of the same, sustained damages to a large amount, to wit, to the amount of $24,923.87, with interest from June 1st, 1868, and thereby an action hath accrued to said plaintiff to have and demand of and from the above-named defendants said sum of one hundred thousand dollars, yet the said defendants have not, nor have either of them paid said sum of money or any part thereof, but so to do have refused and still refuse, to the damage of plaintiffs in said sum of $100,000.

Whereof plaintiff asks judgment for $24,923.87, with interest from June, 1868, & their costs.

GEO. WILLEY, *U. S. Att'y.*

NORTHERN DISTRICT OF OHIO, *ss:*

Henry S. Sherman being duly sworn, says that he is assistant U. S. att'y, and that the foregoing petition is true as he believes.

HENRY S. SHERMAN.

Subscribed and sworn to before me by the said Henry S. Sherman this 3d day of September, 1874.

[SEAL.] L. M. SCHWAN,
Notary Public, Cuyahoga Co., O.

11 To the clerk:

Issue summons in the above cause to Edward Bissell, executor of the last will of Frederick Bissell, returnable according to law.

H. S. SHERMAN,
Ass't U. S. Att'y.

Ap'l 7, '74.—Continued.

And afterward, to wit, at the April term of said court, to wit, on the 28th day of September, A. D. 1874, this cause is continued to the next term of this court.

And afterward, to wit, on the 1st day of October, 1874, the following answer was duly filed herein in said clerk's office, which is in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the northern district of Ohio.

THE UNITED STATES
vs.
HARRY CHASE, FRANCIS J. KING, WILLSON W. Griffith, Russell C. Daniels, James R. Strong, & Edward Bissell, executor of the last will & testament of Frederick Bissell, deceased. } Answer.

Answer of Francis J. King, Willson W. Griffith, Russell C. Daniels, and James R. Strong, and Edward Bissell, executor.

And now come the defendants last above named, to wit, Francis J. King, Wilson W. Griffith, Russell C. Daniels, James R. Strong, and

Edward Bissell, executor of Frederick Bissell, deceased, and for
12 answer to the amended petition of the plaintiff in this case, filed against them, say:

1st. Say that they admit giving the writing obligatory and bond in said petition mentioned and sued upon, and that the said Harry Chase entered upon the duties of collector of internal revenue in the 10th district of Ohio, and held that office until the 11th day of May, 1869. They admit the condition of said bond and writing obligatory is correctly set forth in the said petition.

In regard to the matters and things set forth in the 3d paragraph of the petition, defendants say that no list or return was ever made or rendered by said Toledo, Wabash and Western Railway Company to the assessor or assistant assessor of the said 10th collection district of any taxes upon interest maturing upon bonds or other evidence of indebtedness of said company during the months of August, October, or November of said year 1867; that no such list or return was ever certified or returned by the said assessor to the said collector of said district; that the said Harry Chase never gave any receipt for such list, nor did he ever in any manner as collector become chargeable with the collection of said taxes; nor did he ever receive as public moneys the said sum of $24,823.37, or any part thereof; and they deny that said sum of $24.823.37 *dollars*, or any part thereof, was public money.

They further say that the said Harry Chase, as collector aforesaid, had no authority, right, or power to receive said money or any part thereof as such collector before the same was certified to him by said assessor of said district as taxes due and owing the United States from
13 the said Toledo, Wabash & Western Railway Company. And they deny that the said Harry Chase, as collector as aforesaid, has failed in any manner or form to pay over to the United States any public moneys that came into his hands as is charged in the 3d clause of said petition.

And as to the statements contained in the 4th clause of said petition they say that at the expiration of said term of office of the said collector, the United States, through its proper accounting officers, had a settlement with the said Harry Chase, as collector, and he paid over to the said United States all the moneys that were charged to him. And the United States gave to the said Harry Chase, as such collector, receipts in full of all claims against him as such collector.

And so they deny the several matters and things set forth in said 4th clause of said petition, and say that the said Harry Chase, as such collector, has fully accounted and paid over to the plaintiff all sums due or owing to it, and having fully answered, they pray they may be hence dismissed.

RICH'D WAITE & GEO. R. HAYNES,
& BISSELL & GORRILL,
Att'ys for Def'ts.

STATE OF OHIO,
Lucas Co., ss:

Russell C. Daniels, James R. Strong, & Wilson W. Griffith, being duly sworn according to law, deposes and says that the statements of the foregoing answer are true as they believe.

R. C. DANIELS.
J. R. STRONG.
W. W. GRIFFITH.

14 Sworn to before me and subscribed in my presence this 30th day of September, A. D. 1874.

[SEAL.] W'M H. TUCKER,
Notary Public, Lucas County, Ohio.

THE STATE OHIO,
Lucas County, ss:

Charles A. King, being duly sworn according to law, deposes and says that he is the lawfully authorized attorney and agent of the within-named Francis J. King, and that the said Francis J. King is now absent from the United States, and has been from since before the commencement of this suit; and that the statements of the foregoing answer are true as this affiant is informed and believes.

CHARLES A. KING.

Sworn to before me by the said Charles A. King and by him signed in my presence this 30th day of September, A. D. 1874.

[SEAL.] W. H. TUCKER,
Notary Public, Lucas County, Ohio.

And afterward, to wit, on the 29th day of October, 1874, came said plaintiff by its attorney, and filed herein in said clerk's office its reply, which is in the words and figures following, to wit:

Reply.

Circuit court of the United States, northern district of Ohio.

THE UNITED STATES *vs.* HARRY CHASE ET AL. } Reply.

15 The said United States, plaintiff, in reply to the answer of the said Harry Chase, Francis J. King, Wilson W. Griffith, Russell C. Daniels, & James R. Strong, and Edward Bissell, executor, &c., defendants, says that it has not sufficient knowledge in regard to the matters set up in said answer by way of defence, and therefore the said plaintiff denies the truth of each and every allegation in said answer contained, except what is admitted therein as to the allegations in said petition, and of every allegation contained in said answer inconsistent with the averments of said petition.

By GEO. WILLEY,
Its Att'y.

NORTHERN DISTRICT OF OHIO:

Henry S. Sherman deposes and says that he is assistant United States attorney for said district, and that the statements of the foregoing reply are true as he believes.

HENRY S. SHERMAN.

Sworn to and subscribed by Henry S. Sherman in my presence and before me this 29th October, 1874.

N. P. GOODHUE, *U. S. Com'r.*

Judgment.

And thereupon this cause was continued from term to term of said court until the October term thereof, A. D. 1875, at which said October term, to wit, on the 29th day of December, A. D. 1875, came the plaint-

iffs' attorney, and the said defendant, Harry Chase, having failed to demur to or answer the petition filed herein, it is found that he is in default; and thereupon it appearing by a written stipulation filed in this case that the parties hereto, except said Chase, have waived the intervention of a jury for the trial thereof, this cause was submitted to the court upon the issues joined, and the court having heard the arguments of counsel for the respective parties, and being now fully advised in the premises, does specially find all the facts proved at said trial as follows:

16

The bond described in plaintiffs' petition recites that Harry Chase executes as principal and the said Frederick Bissell and other defendants as sureties, and is in the words and figures following, to wit:

Know all men by these presents that we, Harry Chase as principal, Francis J. King, Willson W. Griffith, Frederick Bissell, Russell C. Daniels, and James R. Strong, sureties, are held and firmly bound unto the United States of America in the full and just sum of one hundred thousand dollars, money of the United States of America, to which payment well and truly to be made we bind ourselves jointly and severally, our joint and several heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this 20th day of April, in the year of our Lord one thousand eight hundred and seventy-six.

The condition of the foregoing obligation is such that whereas the President of the United States hath, pursuant to law, appointed the said Harry Chase collector of taxes under an act entitled "An act to provide internal revenue to support the government, pay interest on the public debt, and for other purposes."

Now, therefore, if the said Harry Chase shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the Secretary of the Treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect, otherwise it shall abide and remain in full force and virtue.

17

HARRY CHASE. [SEAL.]
FRANCIS J. KING. [SEAL.]
WILLSON W. GRIFFITH. [SEAL.]
FREDERICK BISSELL. [SEAL.]
JAMES R. STRONG. [SEAL.]
RUSSELL C. DANIELS. [SEAL.]

Sealed & delivered in the presence of—
A. W. GLEASON.
GEO. W. DAVIS.

[U. S. int. rev. stamp 1 dollar. Canceled Apr. 20, 1866, by N. C.]

TREASURY DEPARTMENT, SOLICITOR'S OFFICE,
May 4th, 1866.

I have examined the within bond and find it to be executed in proper form, and I approve the sureties thereto as sufficient.

[SEAL.] EDWIN JORDAN, *Solicitor.*

During the year 1867, the Toledo, Wabash & Western Railway Company, a railroad company organized under the laws of Ohio, there located, doing business, and having its principal office in said 10th collection district of Ohio, was indebted for money for which bonds had been issued, and payable more than one year after date, upon which coupons representing interest had been stipulated to be paid. The amount of said coupons becoming due and payable in August, 1867, was $190,767.$\frac{50}{100}$; in October, 1867, was $79,400; and in November, 1867, was $226,310. Five per cent. of the amount of said coupons was $24,823.87. Said railroad company was able to pay all interest on its indebtedness. On the 1st day of June, 1868, the treasurer of said company paid to said Chase, then collector of said 10th collection
18 district, as hereinafter mentioned, twenty-four thousand eight hundred and twenty-three $\frac{87}{100}$ dollars, and received from said Chase, as hereinafter set forth, a receipt which recited that Harty Chase, collector of the 10th collection district of Ohio, had received from said company the moneys last aforesaid in full for revenue tax of 5 per cent. of coupons falling due in August, October, and November, 1867. The amount of said coupons falling due in each of said months was in said receipt set forth in the sums hereinbefore mentioned. Said Harry Chase has never reported the receipt of said moneys to any officer or agent of the Treasury Department, nor has he accounted for nor paid over to any such officer or agent any part of the same. No list of return of the amount of said coupons, nor of said tax thereon, was ever made by or in behalf of said railroad company to any assessor or assistant assessor, nor was any valuation nor enumeration of said coupons, nor any assessment of any tax thereon, nor any list or return of said coupons or the tax thereon at any time made by any assistant assessor or assessor. Nor was any list containing a statement of said coupons or the tax thereon ever delivered to said Harry Chase by any assistant assessor, assessor, or other collector, nor was any receipt for such list ever given by said Harry Chase to any assessor, assistant assessor, or other collector. Nor was the assessment of said tax upon said coupons made by the Commissioner of Internal Revenue, or any person acting under his supervision. Neither was any list or return of said coupons, or the tax thereon delivered to said Harry Chase, collector, by
19 the Commissioner of Internal Revenue, or any other person acting under his supervision. Said railroad company became liable to pay taxes according to the unverified returns hereinafter mentioned, made by said company for the months of August, October, and November, 1865, February, April, and May, August, October, and November, 1866, and February, April, and May, 1867, copies of which are as follows, to wit :

UNITED STATES INTERNAL REVENUE.

Return by railroad, canal, and turnpike companies of the amount of interest paid on bonds or other evidences of indebtedness, with the amount of tax withheld. Section 122 act June 30th, 1864, as amended July 13th, 1866. (To be made to the assistant assessor on or before the 10th day of the month following that in which the interest became due and payable; the tax to be paid to the collector on or before the last day of the month.)

Account of all interest maturing on bonds or other evidences of indebtedness, together with the amount of tax thereon withheld from the persons to whom said interest was paid, pursuant to the provisions of the internal-revenue laws by the officers of the T. W. & Western R. W. Company of Toledo, in the 10th collection district of , from the 1st day of July, 1865, to the 1st day of January, 1866, both days inclusive.

20 1865.			Amount.	Rate of tax.	Am't of tax.
Aug. 1	3,400,000	First m't'g bonds Toledo & W. R'y. W. Co	119,000 00	5 pr. ct....	5,950 00
"	270,000	" Ill. & So. I. R. R. Co.....	9,450 00	... do	472 50
Oct. 1	1,000,000	" G. W. R. R. Co.....	50,000 00	....do	2,500 00
Nov. 1	500,000	" Quincy & T. R. R. Co	17,500 00	....do	875 00
"	2,500,000	Second " " Toledo & W. R. R. Co...	87,500 00	....do	4,375 00
"	2,400,000	" " " G. W. R. R. Co.....	84,000 00	... do	4,200 00
"	600,000	Equipment " Toledo & W. R. W. Co...	21,000 00	....do	1,050 00
		Total	$388,450 00	.....	$19,422 50

(Signed) J. N. DRUMMOND, *Treas'r.*

I, J. N. Drummond, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds and other evidences of indebtedness during the time aforesaid, and of the taxes withheld, according to the provisions of law.

(Signed) J. N. DRUMMOND.

Sworn and subscribed before me this 10th day of June, 1868.

GEO. D. DAVIS,
Assistant Assessor.

UNITED STATES INTERNAL REVENUE.

Return by railroad, canal, & turnpike companies of the amount of interest paid on bonds or other evidences of indebtedness, with the amount of tax withheld. Section 122 act June 30th, 1864, as amended July 13th, 1866. (To be made to the assistant assessor on or before the 10th day of the month following that in which the interest becomes due and payable; the tax to be paid to the collector on or before the last day of the month.)

Account of all interest maturing on bonds or other evidences of indebtedness, together with the
21 *amount of tax thereon withheld from the persons to to whom said interest was paid, pursuant to the provisions of the internal-revenue laws, by the officers of the T., W. & Western R'y Co. of Toledo, in the 10th collection district of , from the 1st day of January to the 1st day of May, 1866, both days inclusive.*

1866.			Amount.	Rate of tax.	Am't of tax.
Feb'y 1st	3,400,000	First m'tg'e bonds of Toledo & W. R. W. Co	119,000 00	5 pr. ct....	5,950 00
"	270,000	" " " " Ill. & So. Iowa R. R. Co	9,450 00	....do	472 50
"	1,328,000	" " " " Gr't W. R. W. Co	46,480 00	....do	2,324 00
Ap'l 1st	1,000,000	" " " " same	50,000 00	... do	2,500 00
May 1	500,000	" " " " Quincy & T. R. R. Co	17,500 00	....do	875 00
"	2,500,000	Second " " " Toledo & W. R. W. Co	87,500 00	....do	4,375 00
"	2,400,000	" " " " Gr't West. R. R. Co ...	84,000 00	....do	4,200 00
"	600,000	Equipment " " Toledo & W. R. W. Co	21,000 00	... do	1,050 00
			434,930 00	.....	21,746 50

(Signed) J. N. DRUMMOND, *Treas'r.*

I, J. N. Drummond, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds and other evidences of indebtedness during the time aforesaid, and of the taxes withheld, according to the provisions of law.

(Signed) J. N. DRUMMOND, *Treas'r.*

Sworn and subscribed before me this 10th day of June, A. D. 1868.

GEO. S. DAVIS,
Ass't Assessor.

UNITED STATES INTERNAL REVENUE.

Return by railroad, canal, and turnpike companies of the amount of interest paid on bonds or other evidences of indebtedness, with the amount of tax withheld. Section 122 act June 30th, 1864, as amended July 13th, 1866. (To be made to the assistant assessor on or be-
22 fore the 10th day of the month following that in which the interest became due and payable; the tax to be paid to the collector on or before the last day of the month.

Amount of interest maturing on bonds or other evidences of indebtedness, together with the amount of tax thereon withheld from the persons to whom said interest was paid, pursuant to the provisions of the internal-revenue laws, by the officers of the Toledo, W. & Western R'y Company of Toledo, in the 10th collection district of Ohio, from the 1st day of June, 1866, to the 1st day of January, 1867, both days inclusive.

1866.			Am't.	Rate.	Am't of tax.
Aug. 1	3,400,000	First m'tg. bonds of Toledo & W. R.W. Co	119,000 00	5 pr. ct....	5,950 00
"	270,000	" " " " Ill. & S. I. R. R. Co....	9,450 00	....do	472 50
"	1,328,000	" " " " G. Western R. R. Co..	46,480 00	....do	2,324 00
Oct. 1	1,000,000	" " " " same	50,000 00	....do	2,500 00
"	759,000	Sinking fund " " T. W. & W. R'y Co ...	26,565 00	....do	1,328 25
Nov. 1	500,000	First m tg. " " Quincy & T. R. R. Co..	17,500 00	... do	875 00
"	2,500,000	Second " " " Toledo & W. R. R. Co	87,500 00	... do	4,375 00
"	2,400,000	" " " " G. Western R. R. Co.	84,000 00	....do	4,200 00
"	600,000	Equipment " " Toledo & W. R. R. Co	21,000 00	....do	1,050 00
			$461,495 00	.....	$23,074 75

(Signed) J. N. DRUMMOND, *Treas'r.*

I, J. N. Drummond, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing upon bonds and other evidences of indebtedness during the time aforesaid, and of the taxes withheld, according to the provisions of law.

(Signed) J. N. DRUMMOND.

Sworn & subscribed before me this 10th day of June, 1868.

GEO. D. DAVIS,
Ass't Assessor.

23 UNITED STATES INTERNAL REVENUE.

Return by railroad, canal, and turnpike companies of the amount of interest paid on bonds or other evidences of indebtedness, with the amount of tax withheld. Section 122, act June 30th, 1864, as amended July 13th, 1866. (To be made to the assistant assessor on or before the 10th day of the month following that in which the interest became due and payable; the tax to be paid to the collector on or before the last day of the month.)

Account of all interest maturing on bonds or other evidences of indebtedness, together with the amount of tax thereon withheld from the persons to whom said interest was paid, pursuant to the provisions of the internal revenue laws, by the officers of the Toledo, W. & W. R. R. Co. of Toledo, in the 10th collection district of Ohio, from the 1st day of January, 1867, to the 1st day of April, 1867, both days inclusive.

1867.			Amount.	Rate.	Am't of tax.
Feb'y 1	3,400,000	First m't'g bonds, T. & W. R. W. Co.....	119,000 00	5 p. c't.....	5,950 00
"	270,000	" " " I. & S. I. R. R. Co	9,450 00	....do	472 50
"	1,328,000	" " " G. Western R. R. Co ...	46,480 00	....do	2,324 00
Apr. 1	1,000,000	" " " Same.....	50,000 00	....do	2,500 00
"	960,000	Sinking-fund " T. W. & W. R. W. Co ..	33,600 00	....do	1,680 00
			$258,530 00	....do	$12,926 50

(Signed) J. N. DRUMMOND,
Treasurer.

I, J. N. Drummond, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds and other evidences of indebtedness during the time aforesaid, and of the taxes withheld according to the provisions of law.

(Signed) J. N. DRUMMOND.

Sworn and subscribed before me this 10th day of June, 1868.
[SEAL.] GEO. D. DAVIS,
Assistant Assessor.

Return by railroad, canal, and turnpike companies of the amount of interest paid on bonds and other evidences of indebtedness, with the amount of tax withheld. Sec. 122, act of June 30th, 1864, as amended July 13th, 1866. (To be made to the assistant assessor on or before the 10th day of the month following that in which the interest became due and payable; the tax to be paid to the collector on or before the last day of the month.)

Account of all interest maturing on bonds or other evidences of indebtedness, together with the amount of tax thereon withheld from the persons to whom said interest was paid, pursuant to the provisions of the internal revenue laws, by the officers of the T. W. & W. R. R. Company of Toledo, in the 10th collection district of Ohio, from the 1st day of May, 1867, to the 31st day of May, 1867, both days inclusive.

1867.			Amount.	Rate.	Am't of tax.
May 1	500,000	First m't'g bonds, Quincy & T. R. R. Co..	17,500 00	5 pr. ct....	875 00
"	2,500,000	" " " T. & W. R. R. Co	87,500 00	...do	4,375 00
"	2,400,000	" " " G. Western R. R. Co ...	84,000 00	....do	4,200 00
"	600,000	Equipment " T. & W. R. R. Co.....	21,000 00	....do	1,050 00
"	325,000	Consolidation " T. W. & W. R. R. Co ...	5,687 50	....do	284 00
			$215,687 50	.....	$10,784 38

(Signed) J. N. DRUMMOND,
Treas'r.

I, J. N. Drummond, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds and other evidences of indebtedness during

the time aforesaid, and of the taxes withheld according the provisions of law.

(Signed) J. N. DRUMMOND.

Sworn and subscribed before me this 10th day of June, 1868.

[SEAL.] GEO. D. DAVIS,
Assistant Assessor.

25 And on an unverified return made in similar form for the months of August, October, and November, 1867, handed on the street by the treasurer of said company to said Chase, collector, on said 1st day of June, 1868, to be delivered by him to the assessor of said district or his assistant, together with three checks, which said three checks are in the words and figures following, to wit:

[Stamp.]

No. 674.] TOLEDO, O., *June 1st*, 1868.

Second National Bank of Toledo, O., pay to H. Chase, esq., coll'r, or bearer, sixty-four thousand two hundred forty-three $\frac{75}{100}$ dollars.

$64,243.75.

State of Ohio.

(Signed) J. N. DRUMMOND,
Treasurer.

(Across the face in red:) Good.

NEH. WATERMAN, *Cashier.*

[Rev. stamp.]

No. 419.] TOLEDO, O., *June 9th*, 1868.

First National Bank of Toledo pay to H. Chase, U. S. R. coll'r, or bearer, twenty-four thousand dollars.

$24,000.

State of Ohio.

J. N. DRUMMOND,
Treasurer.

(Across the face in red:) Good for twenty-four thousand dollars.

S. S. HUBBARD, *Cashier.*

[Rev. stamp.]

No. 649.] TOLEDO, O., *June 9th*, 1868.

Second National Bank of Toledo, O., pay to H. Chase, esq., coll'r, or bearer, twenty-four thousand five hundred and thirty-four $\frac{75}{100}$ dollars.

$24,534$\frac{75}{100}$.

State of Ohio.

J. N. DRUMMOND,
Treasurer.

(Across the face in red:) Good.

NEH. WATERMAN, *Cash'r.*

Said checks being certified by the banks on which they were drawn on the first, eleventh, & twelfth of June, 1868, respectively, and were paid by said banks to said Chase on the 30th of June, 1868.

That said Chase, collector as aforesaid, on said 1st day of June, 1868, on receiving said checks, gave said Drummond, treasurer, receipts
26 for said company for the amount of said three checks, which said receipts are in the words and figures following, to wit:

Account of all interest maturing on bonds or other evidences of indebtedness, together with the amount of tax thereon withheld from the persons to whom said interest was paid, pursuant to the provisions of the internal revenue laws, by the officers of the Toledo, W. & W. R. R. Co. of Toledo, in the 10th collection district of Ohio, from the 1st day of January, 1867, to the 1st day of April, 1867, both days inclusive.

1867.			Amount.	Rate.	Am't of tax.
Feb'y 1	3,400,000	First m't'g bonds, T. & W. R. W. Co.....	119,000 00	5 p. c't.....	5,950 00
"	270,000	" " " I. & S. I. R. R. Co	9 450 00	....do	472 50
"	1,328,000	" " " G. Western R. R. Co ...	46,480 00	....do	2,324 00
Apr. 1	1,000,000	" " " Same.....	50,000 00	....do	2,500 00
"	960,000	Sinking-fund " T. W. & W. R. W. Co ..	33,600 00	....do	1,680 00
			$258,530 00	....do	$12,926 50

(Signed) J. N. DRUMMOND,
Treasurer.

I, J. N. Drummond, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds and other evidences of indebtedness during the time aforesaid, and of the taxes withheld according to the provisions of law.

(Signed) J. N. DRUMMOND.

Sworn and subscribed before me this 10th day of June, 1868.
[SEAL.] GEO. D. DAVIS,
Assistant Assessor.

Return by railroad, canal, and turnpike companies of the amount of interest paid on bonds and other evidences of indebtedness, with the amount of tax withheld. Sec. 122, act of June 30th, 1864, as amended July 13th, 1866. (To be made to the assistant assessor on or before the 10th day of the month following that in which the interest became due and payable; the tax to be paid to the collector on or before the last day of the month.)

Account of all interest maturing on bonds or other evidences of indebtedness, together with the amount of tax thereon withheld from the persons to whom said interest was paid, pursuant to the provisions of the internal revenue laws, by the officers of the T. W. & W. R. R. Company of Toledo, in the 10th collection district of Ohio, from the 1st day of May, 1867, to the 31st day of May, 1867, both days inclusive.

1867.			Amount.	Rate.	Am't of tax.
May 1	500,000	First m't'g bonds, Quincy & T. R. R. Co..	17,500 00	5 pr. ct....	875 00
"	2,500,000	" " " T. & W. R. R. Co	87,500 00	...do	4,375 00
"	2,400,000	" " " G. Western R. R. Co ...	84,000 00	....do	4,200 00
"	600,000	Equipment " T. & W. R. R. Co.....	21,000 00	....do	1,050 00
"	325,000	Consolidation " T. W. & W. R. R. Co ...	5,687 50	....do	284 00
			$215,687 50	.....	$10,784 38

(Signed) J. N. DRUMMOND,
Treas'r.

I, J. N. Drummond, do swear that the above statement contains, to the best of my knowledge and belief, a true and faithful account of all interest maturing on bonds and other evidences of indebtedness during

the time aforesaid, and of the taxes withheld according the provisions of law.

(Signed) J. N. DRUMMOND.

Sworn and subscribed before me this 10th day of June, 1868.

[SEAL.] GEO. D. DAVIS,
Assistant Assessor.

25 And on an unverified return made in similar form for the months of August, October, and November, 1867, handed on the street by the treasurer of said company to said Chase, collector, on said 1st day of June, 1868, to be delivered by him to the assessor of said district or his assistant, together with three checks, which said three checks are in the words and figures following, to wit:

[Stamp.]

No. 674.] TOLEDO, O., *June 1st*, 1868.

Second National Bank of Toledo, O., pay to H. Chase, esq., coll'r, or bearer, sixty-four thousand two hundred forty-three $\frac{75}{100}$ dollars.

$64,243.75.

State of Ohio.

(Signed) J. N. DRUMMOND,
Treasurer.

(Across the face in red:) Good.

NEH. WATERMAN, *Cashier.*

[Rev. stamp.]

No. 419.] TOLEDO, O., *June 9th*, 1868.

First National Bank of Toledo pay to H. Chase, U. S. R. coll'r, or bearer, twenty-four thousand dollars.

$24,000.

State of Ohio.

J. N. DRUMMOND,
Treasurer.

(Across the face in red:) Good for twenty-four thousand dollars.

S. S. HUBBARD, *Cashier.*

[Rev. stamp.]

No. 649.] TOLEDO, O., *June 9th*, 1868.

Second National Bank of Toledo, O., pay to H. Chase, esq., coll'r, or bearer, twenty-four thousand five hundred and thirty-four $\frac{75}{100}$ dollars.

$24,534$\frac{75}{100}$.

State of Ohio.

J. N. DRUMMOND,
Treasurer.

(Across the face in red:) Good.

NEH. WATERMAN, *Cash'r.*

Said checks being certified by the banks on which they were drawn on the first, eleventh, & twelfth of June, 1868, respectively, and were paid by said banks to said Chase on the 30th of June, 1868.

That said Chase, collector as aforesaid, on said 1st day of June, 1868, on receiving said checks, gave said Drummond, treasurer, receipts
26 for said company for the amount of said three checks, which said receipts are in the words and figures following, to wit:

Toledo, Wabash & Western Railway Company to United States, D'r.

1868.
For revenue-tax of 5 p'r c't of coupons falling due Aug., Oct., & Nov., 1865, viz :

Coupons of Aug	128,450
" " Oct	50,000
" " Nov	210,000
Total	388,450—5 p'r c't of is $19,422 50

TOLEDO, *June 1st*, 1868.

Received of the Toledo, Wabash & Western Railway Company nineteen thousand four hundred and twenty-two $\frac{50}{100}$ dollars, in full of the above account.

HARRY CHASE,
Coll'r 10th Dist., O.

Examined & found correct.

Toledo, Wabash & Western Railway Company to United States, D'r.

For revenue-tax of 5 p'r c't of coupons falling due Feb'y, Ap'l, May, Aug., Oct., Nov., 1866, viz :

Coupons of Feb'y	174,930
Ap'l	50,000
May	210,000
Aug	174,930
Oct	76,565
Nov	210,000
Total	$896,425—5 p'r c't of is $44,821 25

TOLEDO, *June 1st*, 1868.

Received of the Toledo, Wabash & Western Railway Company forty-four thousand eight hundred and twenty-one $\frac{25}{100}$ dollars, in full of the above account.

HARRY CHASE.
Co'lect r 10th Dist., Ohio.

Examined & found correct.

27 *Toledo, Wabash & Western Railway Company to United States, Dr.*

1868. For revenue tax of 5 p'r ct. of coupons falling due Feb'y, Ap'l, May, Aug., Oct Nov., 1867, viz :

Coupons of Feb'y	174,930
Ap'l	83,600
May	215,687 50
Aug	190,767 50
Oct	79,400
Nov	226,310
$970,695	—5 p'r c't. of is $48,534.75.

TOLEDO, *June 9th*, 1868.

Received of the Toledo, Wabash & Western Railway Company forty-eight thousand five hundred and thirty-four $\frac{75}{100}$ dollars in full of the above account.

(Signed) HARRY CHASE,
Coll'r 10th dist., O.

Examined & found correct.

That all the returns above mentioned when handed to the said Chase as aforesaid, were signed by the treasurer of said company, but the same were not verified by affidavit. That all the said returns, excepting the one for said months of August, October & November, 1867, were delivered by said Chase to the assistant assessor of said district, who thereafter affixed his said jurats thereto, without the appearance of said Drummond, treasurer, or any other officer of said company, and without any affidavit being made. And that the said return for said months of August, October and November, 1867, was not delivered by said Chase to said assistant assessor, or to any other officer or agent of the United States.

$87,954.63 of the moneys received by said Chase upon said
28 checks, the amount of the taxes specified in said return for the months of August, October and November, 1865, February, April & May, August, October & November, 1866, and February, April and May, 1867, were by said Chase duly accounted for and paid over.

Upon the retirement of said Chase from office about May 12th, 1869, a settlement was had with him by the proper officer of the United States, and it was reported by said officer that said Chase collector had fully accounted for and paid over to the United States, all public moneys in his hands; said officer thereupon gave him a receipt in full settlement. The moneys in controversy not having been reported to the government nor charged the collector, were not taken into account in said settlement. One or more of said sureties of said Chase, from time to time made examination of his books to see, and did see, that he paid over all moneys charged to him upon the records in his office, and examined into his final settlement and receipt above-mentioned.

At the time of said settlement said Chase was solvent but has since become insolvent. Said sureties knew nothing of the receipt of said moneys by said collector from said railroad company until after the date next hereinafter mentioned. On the 13th of November, 1873, the revenue agent reported to the Commissioner of Internal Revenue the receipt of said moneys by said Chase, on said date by said agent discovered. This was the first knowledge of said transaction acquired by any officer of the Treasury Department other than Chase, defendant. The Auditor thereupon adjusted an account between the United States and Harry Chase, late collector, charging said Chase with $24,823.87, as received by said Chase, collector, from said railroad company in payment of taxes on interest of bonds not assessed and not by
29 said collector reported nor accounted for. This report was approved by the Comptroller, who thereupon admitted and certified to the register that there was a balance due to the United States from said Chase, as collector, of the amount last above mentioned, as of the date when said moneys were by said Chase received, and that the $100 referred to under article 4th of said amended petition has been paid.

And thereupon the court find, as matter of law, that said plaintiff is entitled to recover of said defendants Hary Chase as principal and Francis J. King, Willson W. Griffith, Russell C. Daniels, James R. Strong, and Edward Bissell, as executor of the last will and testament of Fred'k Bissell, deceased, as sureties, the sum of thirty-five thousand six hundred and thirty-eight & $\frac{80}{100}$ dollars ($35,638.80), to which finding the said defendants, other than the said Chase, excepted. Whereupon said defendants, other than the said Chase, moved the court for a new trial of this cause, upon the ground that said finding of the court last aforesaid was against the law; which motion the court doth overrule, to which

overruling said defendants excepting, said Chase excepted, which exception and the findings and proceedings aforesaid are ordered to be made a part of the record hereof.

It is therefore considered that said plaintiff recover of said defendant Harry Chase, as principal, and said Francis J. King, Wilson W. Griffith, Russell C. Daniels, James R. Strong, and Edward Bissell, executor as aforesaid, as sureties, the sum of ($35,638.80) thirty-five thousand six hundred and thirty-eight & $\frac{80}{100}$ dollars, its damages aforesaid,
30 and also its costs herein expended, taxed at $775.08, the said damages and costs as against the said Edward Bissell, as executor, to be levied of the goods and chattels, lands and tenements which were of the said Fred'k Bissell at the time of his death and in the hands of said Edward Bissell, as executor as aforesaid, yet to be administered.

And thereupon came said defendants, other than said Chase, and moved the court to order the above-named costs retaxed, by striking therefrom an allowance of $712.77 to the district attorney, two per cent. commission on the damages above named, which motion was overruled. To said order overruling said motion, said defendants, other than said Chase, excepted.

And afterward, to wit, on the 3d day of January, 1876, came said defendants, except said Chase, and filed in said clerk's office their bill of exceptions, which is in the words and figures following, to wit:

Bill of ex.

Circuit court of the United States, northern district of Ohio.

THE UNITED STATES
vs.
HARRY CHASE ET AL.

Be it remembered, that on this 3d day of January, A. D. 1876, came Francis J. King, Wilson W. Griffith, Russell C. Daniels, James R. Strong, and Edward Bissell, executor of Frederick Bissell, deceased, and moved the court to order the clerk to retax the costs in this case by striking from the cost bill the allowance to the district attorney of seven hundred and twelve & $\frac{77}{100}$ dollars, two per cent. commission on the amount of the judgment recovered. And thereupon said defendants
31 showed to the court that the clerk has taxed the costs of this suit in the sum of seven hundred fifty-two $\frac{88}{100}$ dollars, and that $712.77 of said costs is an allowance to the district attorney of said two per cent. upon $35,638.80 the amount of damages mentioned in the judgment in the above-entitled cause, no part of which moneys have yet been by the United States collected or realized, which allowances said defendants claimed could not be included in the costs taxed against them under said judgment.

And thereupon said motion came on to be heard and was argued by counsel.

Upon consideration whereof it is ordered that said motion be overruled, to which order said defendants excepted, and because said facts do not fully appear of record, defendants tender this their bill of exceptions, which is at the October term of said court, A. D. 1875, by the judge presiding therein, and who made said order, signed and ordered to be made a part of the record in said cause.

[SEAL.] M. WELKER.

Leave to sue out writ of error without joinder, &c.

And afterward, to wit, at said October term of said court, 1875, to wit, on the 3d day of January, 1876, came the defendants, Francis J. King, Wilson W. Griffith, Russell C. Daniels, James R. Strong, and Edward Bissell, executor of Frederick Bissell, deceased, and moved the court for an order allowing them to sue out of the Supreme Court of the United States a writ of error to procure the re-examination of the judgment rendered at this October term of this court, A. D. 1875, in favor of the United States, and against Harry Chase as principal and the above-named defendants as sureties, for thirty-five thousand six
32 hundred and thirty-eight $\frac{80}{100}$ dollars damages and seven hundred and seventy-five $\frac{05}{100}$ dollars costs, without the joinder of the said Chase in said proceeding.

And it being shown to the satisfaction of the court that said defendants, sureties as aforesaid, have made written request of said Chase for his co-operation in said proceedings, which co-operation is, by said Chase, refused, and that both said Chase and said plaintiff have been duly notified of the pendency of said motion, it is hereby ordered that said motion be allowed.

33 (Indorsed:) 2605. United States circuit court, northern district of Ohio. The United States v. Harry Chase et al. Certified copy of record.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, Earl Bill, clerk of the circuit court of the United States within and for said district, do hereby certify that the within is a true copy of the record of the proceedings of said court in the therein entitled cause.

Witness my official signature and the seal of said court, at Cleveland, in said district, this 14th day of August, in the year of our Lord one thousand eight hundred and 76, and of the Independence of the United States of America the 101st.

[SEAL.] EARL BILL, *Clerk*,
By CHA'S H. BILL, *Deputy Clerk*.

34 Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States within & for the northern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court before you between The United States of America, plaintiff, and Francis J. King, Wilson W. Griffith, Russell C. Daniels, James K. Strong, Edward Bissell, executor of Frederick Bissell, deceased, and Harry Chase, defendants, a manifest error hath happened, to the great damage of the said defendants (excepting the said Harry Chase), as by their complaint appears: and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-

preme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday in the month of October next, in the said Supreme Court, then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 4th day of January, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the 100th.

Attest: [SEAL] EARL BILL,
Clerk U. S. Circuit Court N. D. of Ohio.

(Indorsed:) Francis J. King, Wilson W. Griffith, Russell C. Daniels, Ja's K. Strong, & Edward Bissell, ex'r of F. Bissell, *vs.* The United States. Writ of error. Bissell & Gorrill, Rich'd Waite, George R. Haynes, att'ys for pl'ffs in error.

NORTHERN DISTRICT OF OHIO, *ss:*

The execution of the within writ will appear by the certified transcript of the proceedings in said circuit court in the cause therein named, hereto annexed and returned herewith to said Supreme Court.

Cleveland, O., Aug. 14, '76.

[SEAL] EARL BILL,
Clerk U. S. Circuit Court N. D. of Ohio.

35 THE UNITED STATES OF AMERICA:

Supreme Court of the United States to the United States of America, greeting:

Whereas Francis J. King, Wilson W. Griffith, Russell C. Daniels, James K. Strong, & Edward Bissell, executor of Frederick Bissell, deceased, have obtained the allowance of our writ of error to the circuit court of the United States within & for the northern district of Ohio directed, to remove into the said Supreme Court, to be holden at the city of Washington, on the second Monday in the month of October next, the record of a certain plaint, process, proceedings, and judgment in an action wherein you The said United States in that action lately recovered against the said Francis J. King, Wilson W. Griffith, Russell C. Daniels, James Strong, & Edward Bissell, executor of Frederick Bissell, deceased, and one Harry Chase, thirty-five thousand six hundred and thirty-eight $\frac{80}{100}$ damages and costs, as by the said record in the said circuit court of the United States now remaining appears, in which said record and proceedings, and also in the rendition of the judgment there-, upon, manifest error hath intervened, as by the said Francis J. King-Wilson W. Griffith, Russell C. Daniels, James K. Strong, & Edward Bissell, executor of Frederick Bissell, deceased, we are informed, and our said writ of error granted, issued and allowed as aforesaid, for the purpose of correcting the errors aforesaid alleged, if any there be.

You are, therefore, hereby commanded and cited to be and appear before the judges of the said Supreme Court, at the city of Washington, at the next term of said court, to be holden on the second Monday in the month of October next, to have the errors aforesaid corrected, and the judgment of our said Supreme Court thereupon.

Witness the honorable Morrison R. Waite, Chief Justice of the United

States of America, this 4th day of January, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the 100th.

[SEAL.]

M. WELKER,
Dist. Judge U. S., & Presiding Judge at trial of the above named cause.

Service accepted January 25th, 1876.

GEO. WILLEY,
Att'y for United States for Northern District of Ohio.

(Indorsed:) Francis J. King, Wilson W. Griffith, Russell C. Daniels, James K. Strong, & Edward Bissell, ex'r, &c. pl'ffs in error, vs. The United States, def't in error. Citation in error. Bissell & Gorrill, Rich'd Waite, Geo. R. Haynes, att'ys for pl'ffs in error.

36 *Assignment of errors.*

Supreme Court of the United States, October term, 1876.

FRANCIS J. KING, WILSON W. GRIFFETH, Russell C. Daniels, James R. Strong, Edward Bissell, executor of Frederick Bissell, deceased, plaintiffs in error,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

Now come the above-named plaintiffs in error, by their attorneys, and say, that in the record of the proceedings of the circuit court of the United States for the northern district of Ohio, a transcript whereof is attached to the writ issued in the above-entitled cause, are the following errors:

I. Said circuit court erred in finding as matter of law that defendant in error was entitled to recover of plaintiffs in error, as sureties of said Harry Chase, said sum of thirty-five thousand six hundred and thirty-eight $\frac{80}{100}$ dollars.

II. Said circuit court erred in overruling the motion made by plaintiffs in error for a new trial.

III. Said court erred in rendering judgment in favor of defendant in error against plaintiffs in error.

37 IV. Said court erred in overruling the motion made by plaintiffs in error for the retaxation of costs.

Wherefore said plaintiffs pray that said judgment be reversed at the costs of defendant in error, and that plaintiffs be restored to all things they have lost by reason thereof.

BISSELL & GORRILL.
RICH'D WAITE.
GEO. R. HAYNES.

(Indorsement on cover:) No. 161. Francis J. King, Wilson W. Griffith, Russell C. Daniels, James R. Strong, Edward Bissell, ex'or of Frederick Bissell, dec'd, plaintiffs in error, vs. The United States. N. Ohio. C. C. U. S. Filed 25th September, 1876.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 161.

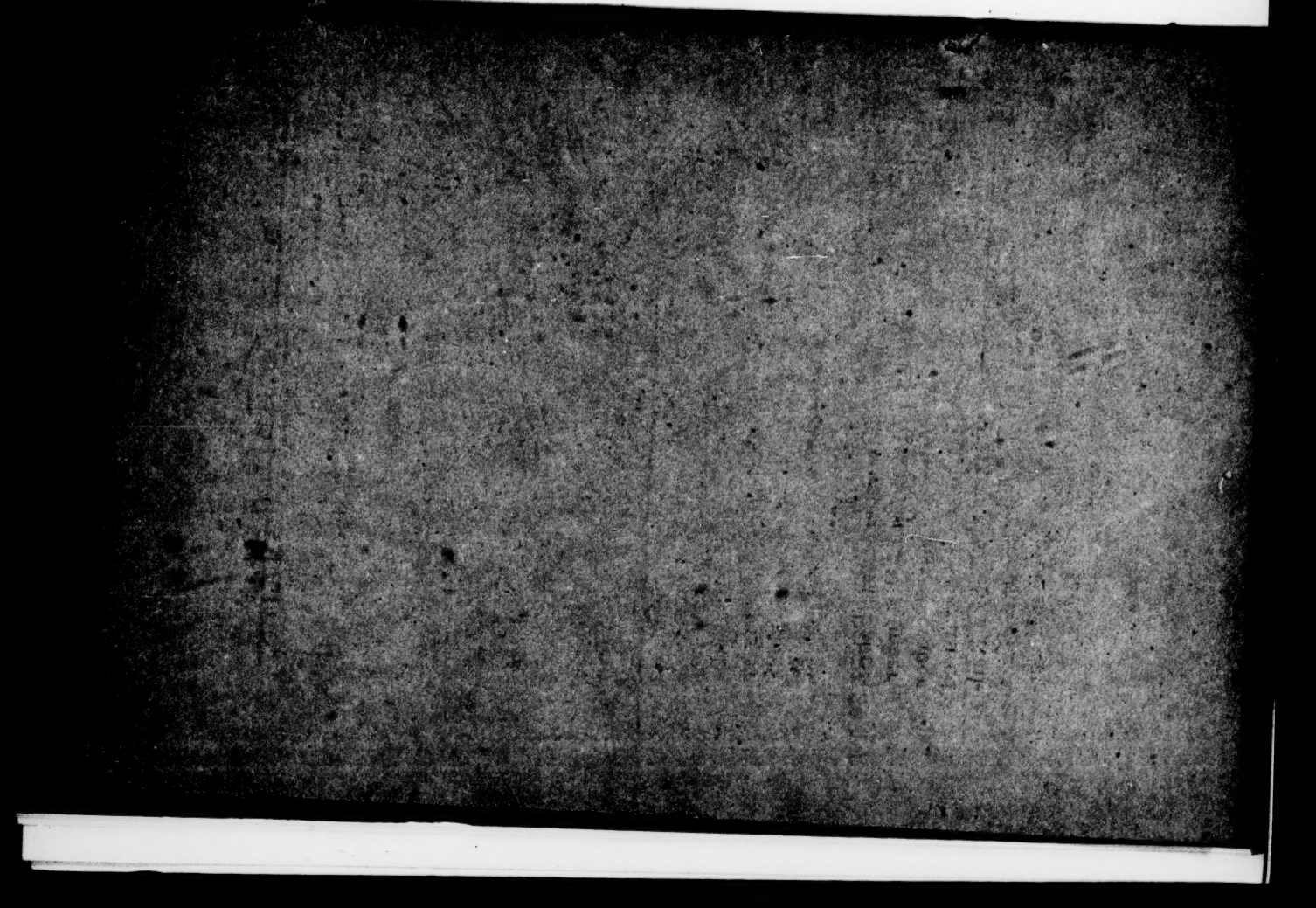
FRANCIS J. KING, ET AL.,

vs.

THE UNITED STATES.

ARGUMENT FOR PLAINTIFFS IN ERROR.

R. & E. T. WAITE,
HAYNES, POTTER & BECKWITH,
BISSELL & GORRILL,
Plaintiff's Attorneys.



Supreme Court of United States.

OCTOBER TERM, 1878.

No. 161.

FRANCIS J. KING, et al.,
vs.
THE UNITED STATES.

Argument in behalf of Plaintiffs in Error.

STATEMENT OF THE CASE.

April 20th, 1866, Plaintiffs in Error executed as sureties the official bond of Harry Chase as Collector of Internal Revenue, in the penal sum of one hundred thousand dollars, conditioned that he should faithfully discharge the duties of said office according to law, and justly pay over all public moneys which should come into his possession. (Printed record, p. 8.)

In August, October and November, 1865, February, April, May, August, October and November, 1866, and February, April, May, August, October and November, 1867, respectively, interest matured upon bonds of the Toledo, Wabash & Western Railway Company. As each installment became due a duty of five per cent. thereof was owing by said corporation to the United States. (p. 9 to 13.)

On the first day of June, 1868, its Treasurer made out returns of said taxes, *which he delivered upon the street without verification to said Collector*, who was in turn to hand the same over to the Assistant Assessor. (p. 9, 13, 15.)

The Treasurer at the same time paid Chase the amount of said taxes, $112,778 50, for which receipts were executed by the Collector to the Railroad Company. (p. 9, 13, 14.)

All the returns except the one for August, October and November, 1867, were by Chase delivered to the Assistant Assessor, who, without affidavit being made, affixed thereto jurats, certifying that the same were sworn to before him by the Treasurer. The taxes evidenced by the returns so delivered were entered upon the assessment list, and were by the Collector accounted for and paid over. (p. 15.)

The unverified return for August, October and November, 1867, was never delivered, nor were the taxes therein set forth, $24,823.87, accounted for or paid. (p. 9, 15.)

Except as we have stated, no return of said last mentioned taxes was ever made by said Railway Company. They were never set forth in any assessment list. At no time during the continuance of Chase in office were they specified in any official document. While his said term existed, and for nearly five years after its close, no officer of the Treasury Department, other than Chase knew that these taxes had accrued or that said moneys had been to him delivered. (p. 9, 15.)

He retired from office May 12th, 1869, having ac-

counted for everything charged against him upon the books of the Treasury Department, and receiving a full receipt upon final settlement. (p. 15.)

His sureties during his continuance in office kept diligent watch of his official transactions, and saw for themselves that his final settlement was properly made. They had no knowledge of said misappropriation. (p. 15.)

When he left office he was solvent, but before the occurrences hereinafter stated became insolvent. (p. 15.)

November 13th, 1873, a Revenue Agent first discovered said transaction between Chase and the Railway Company. The department thereupon charged the ex-collector with $24,823.87, as moneys received by him for taxes not assessed or accounted for. Suit was brought against him and his sureties for this amount, with interest. Jury trial being waived, the Circuit Court, upon said facts, found that the United States was entitled to recover. Motion for new trial was overruled and judgment entered. (p. 8, 15.)

The sureties, by leave of Court, prosecute here their writ of error. They ask a reversal, upon the ground that the facts proved did not authorize any judgment against them. (p. 17 to 19.)

I.

The failure of Chase to deliver said unverified return to the Assessor was no breach of official duty for which his sureties are responsible.

Both parties to this bond, at the time of its execu-

tion, had reference solely to the faithful performance by the Collector of the duties of his office "according to law." The instrument authorizes no claim against the sureties, unless the alleged delinquency of their principal relates to something which the statute, by express statement or manifest implication, made part of his official function.

To authorize judgment in its favor the United States was required to prove that his receipt of said moneys formed part of such duty.

These funds, in the hands of the Treasurer of the corporation, were not *public moneys*. His transfer to Chase could not invest them with that quality, unless Chase was then by law authorized to receive them as such and to bind the Government by such receipt. For the moment that those funds became public property, so much of the tax on whose account they were delivered, was paid. The obligation to the Government of the party liable to the tax was to that extent discharged.

If, on the other hand, Chase was not at that time empowered in behalf of the United States to collect and receipt for these taxes, said moneys in his hands remained the property of the Railway Company. The fact that he held the office of Collector did not alter the legal nature of the transaction. It was the same thing that it would have been had the company selected any other officer of the government or private individual in its behalf to adjust and pay its taxes. If such commission be not executed, and said funds be by such individual lost or misappropriated, the loss must fall upon the company which selected

him as its agent, and trusted him as its bailee. *Its tax is neither adjusted nor paid.* Its obligation to make such payment remains the same as before.

We respectfully maintain that this record shows that the United States failed to prove that Chase was, on the first day of June, 1868, in its behalf legally authorized to collect and receipt for these taxes; that it shows on the contrary that he was not at that date empowered to bind the government by such action; and that the attempt of the Treasury Department to collect from these sureties taxes which are this day owed the United States by said Railway Company is inequitable as well as illegal.

II.

The law which regulated the rights of the parties to this suit prescribed that as said taxes respectively accrued, the Railway Company should, under oath, return a true and faithful account of the amount thereof to the Assessor; 14 Stat., p. 138, § 122.

Upon such return, if correctly made, this officer was then to assess the tax. In other words, if satisfied that the return stated correctly the amount of tax due, he was to express such determination by entering the tax, with the name of the company liable for its payment, upon an assessment list. 13 Stat., 225, § 12; 228, § 18. Vol. 14, 103, § 20; 150, § 11.

If the return was insufficient, or if no return was made, the Assessor was to assess such tax upon the best information he could obtain, and add thereto a penalty. 14 Stat., 101, § 14.

A certified copy of the assessment list was by the Assessor to be delivered the Collector, who thereupon was authorized and required to collect the tax. 14 Stat., p. 103, § 20.

A full and correct copy of such list, receipted by the Collector, was to remain with the Assessor, open to the inspection of any person who might apply. 13 Stat., p. 232, § 27.

At the same time duplicate statements of said list, receipted by the Collector, were to be sent respectively to the Commissioner of Internal Revenue and Secretary of the Treasury. § 27, last cited.

A like course of procedure was prescribed for the assessment and collection of the various other taxes imposed by the Internal Revenue Statutes. Act of June 30th, 1864, § 11, 12, 13, 16, 17, 18. 27, 31, 32, 33, 34, 43, 47, 49, 82, 84, 85, 109, 114, 115. 121, 125. Vol. 13 Stat., 225 to 286; act of March 3, 1865, § 116. Vol. 13 Stat., 479; act of March 10, 1866, § 3, 4. Vol 14 Stat., 5; act of July 13, 1866, § 9, sub. 14, 20, 72, 79, 80, 87, 89, 93, 94, 103, 110, 120, 147, 148; § 24, 31, 46, 49, 70. Vol. 14 Stat., 100 to 173; act of March 2, 1867, § 118. Vol. 14 Stat., 479.

The return to the Assessor was to be made by the party liable to the tax on or before the tenth day of the month next after the tax became "due and liable to be assessed." The tax was to be certified by the Assessor to the Collector on or before the last day of the same month, at which time the tax was to be payable to the Collector, due provision being made for previous notice to the taxpayer. 14 Stat., 150, § 11.

These citations illustrate the general principle upon which the Revenue Statutes in force in 1868 were based; and by which the powers of this Collector must be determined. A legislative intent is everywhere manifest, that to authorize the Collector legally to convert the funds of the party liable to the tax into *public moneys* the amount of the debt due from such party must first have been adjusted, determined or stated by an officer charged with that especial function, and required to make record of such action. The "assessment" or "levy" was to precede the "collection." 12 Stat., 433, § 2. Vol. 13, 223, § 1; 224, § 8; 483, § 4.

III.

No statute made it the duty of the Collector to receive moneys from the Railway Company before any officer in behalf of the United States had determined the amount of tax from said Company due. *The sureties may properly stand upon the letter of their bond.*

We moreover respectfully insist that the ruling here sought to be reviewed was opposed to the whole spirit and policy of said revenue enactments.

A determination of the amount due from the party subject to the tax was required to be made by an officer specially charged with such duty, to insure that each individual would contribute his full proportion of the public revenue. The designation of said officer, the oath required from the taxpayer, the penalty prescribed for evasion or disobedience, the whole machinery connected with the assessment of

the tax, all tend to this end. Such aim will be thwarted, should a Court sanction an attempt by the taxpayer to adjust with the Collector the amount of tax against himself chargeable, unverified by oath, and under an implied promise of the Collector to use his influence with the Assessor to procure an acceptance of such adjustment.

A record of the taxes due was required to be made by the proper officer in order that the government might know the resources at its control. It accordingly directed that the party liable to the tax should himself deliver to that officer the document in connection with which such record was to be made. This intent of the law-maker will be frustrated, should the Courts hold that said obligation of the taxpayer can to any extent be fulfilled by a delivery to the Collector

But the especial reason why the prior adjustment and record of the tax by another official was required as a legal prerequisite to its receipt by the Collector, was the intent of Congress, through the records and supervision of another department, to provide a check against misappropriation or loss.

If all the moneys which an agent is authorized to collect be set forth in some writing by him receipted for, in the charge of a representative of his principal, commissioned to see that said moneys are by such agent properly accounted for and paid over, a fair probability exists that such funds will be by said principal duly received.

If, however, that agent may lawfully go to any debtor of his principal in said writing unspecified,

adjust with him the amount of his indebtedness, receive from him the moneys by such adjustment found due, and thenceforth hold such funds at the risk of such principal, a temptation and opportunity for misappropriation is at once presented. The whole knowledge of the transaction resting between the agent and the debtor, detection will in any event be delayed, and may never occur. Should the funds be lost by negligence, no means are at hand whereby such loss may be seasonably ascertained and remedied. If the business of such agent require many subordinates, the risk of loss through misappropriation or neglect is increased in proportion to the number of the employees.

Therefore the law wisely provided that the lists delivered the Collector *should include all the taxes he was authorized to receive*, and made it the duty of the tax payer to ascertain that his taxes were included in said lists before making payment.

The Treasurer of the Railway Company paid Chase nearly one hundred and thirteen thousand dollars. Suppose Chase had withheld all the returns and misappropriated all the moneys, would the thirteen thousand dollars in excess of the penal sum named in this bond be lost by the United States? If these funds were in the hands of that officer public moneys, there is no other alternative.

Suppose Chase, on the same day, had met nine other large tax payers, and with them executed similar transactions; suppose he had suppressed all their unverified returns, paid every obligation against himself by the Treasury Department charged, and with a full receipt upon final settlement in his pos-

session, taken the million dollars thus to him delivered to a foreign country, or gambled it away here at home, would the moneys thus embezzled be the Nation's loss? Are the public moneys of the United States those funds which have first been by the proper officer declared to be such under proper record; or are they any moneys in the pockets of any Collector received from any party "subject" or "liable" to taxes?

We earnestly claim that in the cases supposed said funds would be in law the property of said individuals, by them delivered to the Collector under the full knowledge that he in his official capacity had no right to receive them, and delivered to him with the intent that the parties making such delivery might thereby evade a statutory obligation to make oath to a return. It would manifestly permit them to take advantage of their own wrong were the Court to sanction the idea that they could thus pay their taxes, and by this method place their funds at the public risk and charge. If the Collector fail to pay their moneys into the public treasury, he violates his promise to them, not his official obligation to the United States. Their taxes remain unpaid. It becomes forthwith upon discovery of such transactions the duty of the proper officers to make from said parties legal collection.

We believe then that when this bond was executed the Government did not contemplate that Chase would attempt to collect taxes in this way, or that such funds if so received would be in his possession public moneys.

The sureties certainly intended to guarantee nothing more than that the officer should perform the duties pointed out by the statute in the method therein indicated. They expected that all moneys he should collect would be set forth in some official document delivered to him by proper authority before such collection should be made. They anticipated a constant watch, supervision and check over the operations of their principal by those members of the Treasury Department legally charged with such duty. They supposed that by reference to such documents they themselves could supervise his conduct, and assist in holding him to the faithful performance of every official obligation.

Will your Honors please recall to recollection the various amounts and descriptions of taxes imposed by the revenue statutes in force on the 20th day of April, 1866; the merchants, manufacturers, tobacconists, brewers, distillers, bankers, brokers, license, income, legacy, succession, railroad, steamboat, vessel, toll-road, ferry, bridge, telegraph, gas, express, insurance taxes, and many more, each demanding large contribution from the individual tax-payer.

The finding of the Circuit Court asserts that these sureties, when they signed that bond, were legally required to know that said Collector might go to each or all of said parties liable to said taxes, take from each the amount by him asserted to be to the Government due, the whole knowledge of the transactions confined to the Collector and the respective individuals with whom he should so deal, no record any where made, and that these funds in the hands

of that Collector would be public moneys, for which they agreed to be responsible.

This amounts to the statement that no possible vigilance could guard said sureties against the Collector's negligence or misappropriation; no possible industry could enable them to know the extent of their liability.

And as no statute of limitations has application, this liability is to continue indefinitely. A transaction is discovered in 1873 which authorizes a thirty-five thousand dollar judgment. Another comes to light in 1880, which justifies a demand for thirty-five thousand dollars more, and so on. While life lasts, or assets remain in the hands of descendants, the accumulated savings of the surety are liable to be swept away. The Government is only required to prove that during the official term of the Collector certain individuals were subject to certain contributions to the public revenue, that they delivered to the Collector certain moneys on account thereof, and that this officer failed to pay over to the United States the funds so received.

And this liability is not to be limited to the action of the Collector solely. The sureties are to respond for the same acts, negligence or defalcation proved against any of his deputies. (Printed Record 8, Vol. 13 Stat., 225, § 10.)

Is it not apparent, that no man in his senses would assume a liability of such description? Were the law officer of the Government to write out such obligation in full in his draft of the bond, would he not effectually prevent any security being obtained for

the faithful performance of duty by the Collector? And does not said ruling of the Circuit Court contradict every decision known to our law, wherein the rights and liabilities of sureties are defined?

IV.

The facts proved authorize the fair presumption that the Railway Company acting through its Treasurer, desired to avoid making oath to its returns. It wished the documents to appear legally made, without incurring the responsibility of affidavit. It selected the Collector as its agent for the carrying out its scheme, in expectation that his relations with the Assistant Assessor would induce the affixing the jurats without actual appearance.

These moneys had been originally owed by the corporation to its bond creditors. It was by law directed to withhold the same from the persons to whom it was due, and pay such amount as a tax to the United States. It had commenced such withholding in August, 1865, and had continued the practice until November, 1867. Said installments were payable almost monthly, and the tax was upon each within thirty days thereafter to be paid. No attempt towards payment was made until June 1st, 1868. For nearly three years this Company had used some portion of this money to which it had no right, and whose use the government should have enjoyed. If, now, its Treasurer went to the Assessor with its return, that officer was by law required to impose a penalty for delay. The Commissioner of Internal Revenue would allow no remission unless a

fair interest were paid the government in compensation. But if the returns were sent through the Collector, with his assurance that the taxes therein specified had been to him paid, and that full receipt had been given, the vigilance of the Assessor might not be aroused, and the payment might be accepted without investigation.

For these ends the Railway Company paid said moneys to the Collector, and thus subjected him and his employees to such powerful temptation. And now when, in consequence thereof, loss has occurred, who should sustain it; the Company which delivered its funds to Chase with express intent that it might thereby evade performance of its just obligations to the United States, or these sureties, who without one penny of compensation signed this official bond in assistance of the government in its collection of its revenue?

If a private individual send out his agent to collect *liquidated* demands, and a debtor whose account has not been settled pay such agent moneys, those funds in the hands of that agent will remain at said debtor's risk. It makes no difference that the money was actually owed the principal, and that the agent executed a receipt in the name and behalf of such principal. The agent was not authorized to receive or receipt. He had a special; not general agency. The debtor was required to know the extent of his authority. If the moneys do not reach such principal; if they be by the agent lost or squandered, the debtor must pay his debt whenever the principal shall demand. And if the circumstances of the payment

to the agent induce a suspicion that it was made by the debtor under an expectation that he might thereby avoid accounting to said principal for interest upon moneys theretofore wrongfully withheld, he will be likely to find little sympathy on account of his loss.

The rules of law applicable to such private agency, are equally applicable to transactions between a party liable to pay taxes and a public collector. *Whiteside* vs. *U. S.*, 3 Otto, 247, 257.

V.

We are aware that the 41st section of the Act of 1864, as amended in 1866, asserts "that it shall be the duty of the Collectors aforesaid, or their Deputies, in their respective districts, to collect all the taxes imposed by law, however the same may be designated. 13 Stat., 239 Vol., 14, 101, 111.

This clause was probably designed to prohibit the Commissioner of Internal Revenue and Secretary of the Treasury from claiming, under the general powers conferred upon them by the revenue statutes the right to detail officers other than the Collectors or their Deputies for the collection of particular taxes.

The language cannot fairly bear a broader construction.

The Act of 1864, in which this expression is first found, expressly made many taxes payable directly to the Commissioner of Internal Revenue 13 Stat., 239, § 41; 277, 278, § 110; 283, 284, § 120; 284, 285; § 122.

Congress could not have intended by these two lines of its statute to practically nullify its entire

elaborate scheme for the assessment and record of taxes prescribed by another portion of the same enactment.

The clause simply means that it shall be the duty of the Collectors or their deputies to collect all taxes in the manner and under the circumstances in the Act elsewhere stated.

This same section provides that suit shall not be brought by the Collector in the name of the United States for the collection of taxes unless the Commissioner of Internal Revenue authorize or sanction the proceeding. (14 Stat., 111, § 41.) Congress did not intend to vest in the Collector and his deputies the more dangerous and irresponsible power of collecting unassessed and unrecorded taxes without publicity.

Said Act made careful provision for check and supervision of the action of the Commissioner of Internal Revenue. (13 Stat., 223, § 2.) It could not at the same time have meant that every Collector and Deputy Collector in the United States should legally receive moneys for taxes without check or supervision.

The 33d section of said law shows its true meaning. It does not contemplate that the Collector is to collect all taxes owed the United States within his district. His function is limited to "the collection of all sums *assigned to him for collection as aforesaid*." 13 Stat., 236, § 33.

The 34th section declares the taxes with which the Collector is to be charged. It does not authorize the Treasury Department to charge against said

officer "taxes not assessed" or recorded. 13 Stat., 237, § 34; 229, § 20. Vol. 14, 110, § 34; 103, § 20. Printed Record, 15.

VI.

We may, for the purposes of this argument concede that no assessment by the Assessor was necessary to authorize an action in the name of the United States against the party liable to the tax for its recovery.

If the Assessor failed to make proper assessment it was because such party failed to perform his prior duty to make the full and correct return in connection with which the assessment was to be made. He could not urge his own neglect as a defence to said action.

Were suit now brought by Government against this Railway Company for the taxes in question, it would not be permitted to object that no assessment by the Assessor had been made.

Such suit could not be brought without the prior authorization and sanction of the Commissioner of Internal Revenue. He is by law constituted the head of the Internal Revenue Assessment Department. His determination of the amount for which the action is to be prosecuted, would, in such suit, be by the Court considered a sufficient assessment. 41 Stat., 111, § 41. Vol. 12, p. 432, § 1. Vol. 13, p. 223, § 1.

All this has nothing to do with the liability of these sureties. The question here at issue is whether the Collector was legally empowered to receive taxes

from the party liable to the same without a prior determination of the amount due by an officer legally qualified thereto. The rules which regulate the rights of the government in its action against the individual liable to the tax have no application.

We therefore respectfully submit that the decision of this Honorable Court in "The Dollar Savings Bank vs. The United States," 19 Wallace, 227, (declared in the opinion of the Circuit Court to require the judgment by it rendered), has no relevancy to this controversy, but does decide that the government may still collect these taxes by suit against the Railway Company. 16 Stat., 261, § 17.

The law declared that the Railway Company should pay a tax of five per cent. upon its interest coupons. The *rate* of tax was in the statute designated, but not the *amount*. That was to be determined by the amount of coupons issued. *Somebody*, in behalf of the United States, was to ascertain this sum. That official was not the Collector. Until such officer had acted there was nothing for the Collector to receive. The United States had not yet determined the proportion of the public revenue by the Railway Company to be paid. If said Company see fit to deliver its funds to the Collector in anticipation of such determination, neither the government nor his sureties insure that those funds will by him be kept safely.

If Chase was legally empowered to collect the taxes under consideration, he and his deputies could, with like legality, in the same manner, have received every other tax owed the United States within their

district. The power which he and they possessed was, for their respective districts, vested in every other Collector and Deputy Collector. The whole careful statutory provision, devised for the ascertainment and record of the fiscal resources of the United States, is, by the finding of the Circuit Court, asserted to have amounted to nothing.

[As above stated, we believe that if suit were now brought by the United States against the Railway Company for the collection of said taxes the Defendant would be estopped from objecting that no assessment by the Assessor had been made. It is, nevertheless, the duty of the Commissioner of Internal Revenue, before the commencement of such action, to determine the amount of tax due through formal assessment, by him certified to the proper Collector. 17 Stat., 402, § 2.]

VII.

The action of the Treasury Department in making a charge against the ex-Collector and commencing this suit, is no legal ratification of the receipt by Chase of the moneys in controversy.

If the Government, in 1873, had the right to look to the Railway Company for the payment of the tax, no officer of the Government was in its behalf empowered to relinquish this privilege, and substitute therefor a claim against the ex-Collector for the moneys by him received from said Company. The Treasury Department was not authorized to ratify the ex-Collector's action, to charge against him said moneys, or direct the commencement of this suit. It

was, on the contrary, legally charged with the duty, forthwith upon the report of the Revenue Agent, of collecting from said Company the taxes in question.

VIII.

In support of our foregoing propositions, we cite *Cossart* vs. *Spence*, 23 Ark. Rep. 374.

IX.

The Circuit Court included in its judgment an allowance to the District Attorney of two per cent. upon the amount found due from Plaintiffs in error. (Record, p. 16.)

We respectfully claim that said judgment was in this respect erroneous. (p. 19.)

The allowance was declared to be authorized by the 11th section of the Act of March 3d, 1863, which provides "That there shall be taxed and paid to District Attorneys two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws in which the United States is a party." 12 Stat., 741.

This allowance is to be taxed upon "moneys collected or realized," not the amount for which judgment is rendered. The taxation specified is an assessment upon the proceeds of the judgment made by an officer of the Treasury Department.

The term "realized" refers to moneys obtained through compromises specified in the next preceding section. The word "proceeding" includes cases of distraint and other summary measures instituted by Collectors or Commissioners of Internal Revenue

In many of these instances no judgment for costs is contemplated.

The remainder of the section states that "The Act in relation to costs, approved February 26th, 1853, shall not apply to such allowances, and the same shall be in lieu of all costs and fees in such suit or proceedings."

This is equivalent to a declaration that these allowances are *not* to come into the cost bill, but are to be paid the District Attorney from the Treasury in lieu of the costs to which he would have been entitled under the prior Act. They are not to be paid unless something is collected. But on the other hand the District Attorney is not, as regards these allowances, to be restricted to the $6,000 annual compensation in said previous Act specified. 10 Stat., 166, § 3.

We assume that this section will, in favor of Plaintiffs in error, receive a strict construction, and believe that an examination of the remainder of the statute will confirm our position.

We therefore respectfully ask that the judgment of the Circuit Court be reversed.

R. & E. T. WAITE,
HAYNES, POTTER & BECKWITH,
BISSELL & GORRILL,
Plaintiff's Attorneys.

Rich'd Waite
of Counsel for Plff. in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

FRANCIS J. KING ET ALS.
vs.
THE UNITED STATES.
} No. 161.

ERROR TO UNITED STATES CIRCUIT COURT FOR NORTHERN OHIO.

DEFENDANTS' BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

FRANCIS J. KING ET ALS.
vs.
THE UNITED STATES. } No. 161.

ERROR TO UNITED STATES CIRCUIT COURT FOR NORTHERN OHIO.

DEFENDANTS' BRIEF.

STATEMENT.

Suit upon the official bond of Harry Chase, late collector of internal-revenue taxes for the tenth district of Ohio, to recover $24,823.87 paid him by the Toledo, Wabash and Western Railroad Company, as such taxes upon interest-coupons of that corporation, paid to said Chase on the first day of June, 1868, for the months of August, October, and November, 1867, for which he gave his receipts as such collector, but failed to report the reception of the money to any officer or agent of the Treasury, or to account for or pay over any part of the same to the United States.

"No list or return of the amount of said coupons, nor

of said tax thereon, was ever made by or in behalf of said railroad company to any assessor or assistant assessor, nor was any valuation nor enumeration of said coupons, nor any assessment of any tax thereon, nor any list or return of said coupons or the tax thereon, at any time made by any assistant assessor or assessor. Nor was any list containing a statement of said coupons or the tax thereon ever delivered to said Harry Chase by any assistant assessor, assessor, or other collector, nor was any receipt for such list ever given by said Harry Chase to any assessor, assistant assessor, or other collector, nor was the assessment of said tax upon said coupons made by the Commissioner of Internal Revenue, or any person acting under his supervision. Neither was any list or return of said coupons, or the tax thereon, delivered to said Harry Chase, collector, by the Commissioner of Internal Revenue, or any other person acting under his supervision. Said railroad company became liable to pay taxes according to the unverified returns mentioned in the record, made by said company for the months of August, October, and November, 1865, February, April, and May, August, October, and November, 1866, and February, April, and May, 1867," copies of which are given in the record. (See pp. 9 to 14.)

All the returns above mentioned, when handed to the said Chase as aforesaid, were signed by the treasurer of said company, but the same were not verified by affidavit. All the returns, excepting the one for August, October, and November, 1867, were delivered by Chase to the assistant assessor of said district, who thereafter affixed his jurats thereto, without the appearance of the treasurer, or any other officer of said company, and without any affidavit being made. And that the said return

for August, October, and November, 1867, was not delivered by said Chase to said assistant assessor, or to any other officer or agent of the United States.

Of the moneys received by said Chase upon said checks, $87,954.63, being the amount of the taxes specified in said return for the months of August, October, and November, 1865, February, April, and May, August, October, and November, 1866, and February, April, and May, 1867, were by said Chase duly accounted for and paid over.

Upon the retirement of said Chase from office, about May 12, 1869, a settlement was had with him by the proper officer of the United States, and it was reported by said officer that said Chase, as such collector, had fully accounted for and paid over to the United States all public moneys in his hands; said officer thereupon gave him a receipt in full settlement. The moneys in controversy not having been reported to the government nor charged the collector, were not taken into account in said settlement. One or more of said sureties of said Chase, from time to time, made examination of his books to see, and did see, that he paid over all moneys charged to him upon the records in his office, and examined into his final settlement and receipt above mentioned.

At the time of said settlement said Chase was solvent, but has since become insolvent. The sureties knew nothing of the receipt of said moneys by said collector from said railroad company until after the date next hereinafter mentioned.

On the 13th of November, 1873, the revenue agent reported to the Commissioner of Internal Revenue the receipt of said moneys by said Chase, on said date by said agent discovered. This was the first knowledge of

said transaction acquired by any officer of the Treasury Department other than Chase, defendant. The Auditor thereupon adjusted an account between the United States and Harry Chase, late collector, charging said Chase with $24,823.87 as received by said Chase, collector, from said railroad company in payment of taxes on interest of bonds not assessed, and not by said collector reported nor accounted for. This report was approved by the Comptroller, who thereupon admitted and certified to the Register that there was a balance due to the United States from said Chase, as collector, of the amount last above mentioned, as of the date when said moneys were by said Chase received, and that the $100 referred to under article 4 of said amended petition has been paid.

Thereupon the court found, as matter of law, that said plaintiff was entitled to recover of said defendants the sum of $35,638.80, to which finding the said defendants, other than the said Chase, excepted. (Record, 15).

Judgment having been entered for the plaintiffs for debts and costs, the defendants moved the court to order the clerk to retax the costs in this case by striking from the cost-bill the allowance to the district attorney of $712.77, two per cent. commission on the amount of the judgment recovered. And thereupon said defendants showed to the court that the clerk has taxed the costs of this suit in the sum of $752.88, and that $712.77 of said costs is an allowance to the district attorney of said 2 per cent. upon $35,638.80, the amount of damages mentioned in the judgment in the above-entitled cause, no part of which moneys have yet been by the United States collected or realized, which allowances said defendants claimed could not be included in the costs taxed against them under said judgment.

And thereupon said motion came on to be heard and was argued by counsel.

Upon consideration whereof, it is ordered that said motion be overruled, to which order said defendants excepted. (Record, 16, lower half.)

BRIEF.

I.

After the performance of certain clerical and ministerial work, it is confessed that this collector of internal revenue, Harry Chase, would have been entitled officially to demand and receive, and bound faithfully to account for and pay over, the precise sum that was voluntarily paid to him from the corporation making the payment upon the very consideration which led to its being made. There was a waiver upon the part of the government officer and the tax-payer of those forms, returns, and verifications, which the statute has directed should be filled out and presented in the course of the proceedings for the assessment and collection of the tax.

This court has decided that the right to the tax exists independently of any such forms; and that, the facts being ascertained, the law affixes the liability to tax. (Savings Bank *vs.* United States, 19 Wall., 240; United States *vs.* Ferrary, 93 U. S., 630, 631.)

It was money had and received to the use of the government, paid to Mr. Chase and received by him, solely because he was the officer designated to accept satisfaction for the United States of those obligations which the payer and recipient both then intended should be discharged by this payment. In other words, it was officially received; and, therefore, those who guaranteed

the good faith of this functionary in his office are liable, in law and equity, to account for it.

In his recent work on Taxation, page 498, top, Judge Cooley says, of the liability of a public officer for moneys by him collected in that capacity, that "he would not be permitted to rely on technical objections which might be made to the right of the public to the money. If he receives the money to the use of the public, he should [*i. e.*, it is his *official* duty to] account for it; and *it is immaterial that those who have paid it might have successfully resisted its collection from them.*" Neither he nor his sureties have any right to say that, *quoad hoc*, he was not a public officer. The bond in suit was for the faithful discharge of Mr. Chase's official duties. *It was a breach of this condition for him to exact illegal taxes and put them in his own pocket.* (Carlyle *v.* Sharpe, 51 Ill., 71, 72, bottom.)

In Maine, it was held (Kent, J., delivering the opinion), that "misconduct in office" is not limited to such acts as the law requires or expressly authorizes, but may be committed by falsely certifying to the state of a record as to which the register was not obliged to give any certificate at all. (State *v.* Leach, 60 Maine, 58, 70, and 71, bottom.) As Judge Cooley observes, "On every principle of right and justice he is precluded from denying his official character under such circumstances." (Cooley on Taxation, 192, and cases cited.)

If he seeks to avoid a breach of his bond by saying that the taxes were voluntarily paid by the corporation, then, as it could not recover its money so paid from him, he has no excuse for with holding it from the United States.

This question has most frequently arisen in suits upon

bonds of collectors of taxes, where the defense of illegality of the assessment or collection has been attempted; which is precisely the plea here set up; for the money paid was intended for and considered a tax by the parties.

Speaking of such a defense by a city treasurer, Black, J., said: "Shall he be allowed to assert that a tax is chargeable when he demands [or receives] it from the citizen, and then say it was not chargeable when the State demands it from him? It seems much more just and reasonable to require that every agent of the commonwealth who receives money for her in the shape of taxes should pay it over, and let the aggrieved party make his appeal to the State herself. Some of these taxes were received more than eleven years ago. Doubtless the persons who paid them have no expectation that they will be refunded. If the treasurer can keep them from the State on the ground that the law did not authorize him to receive them, he will not be obliged to pay them at all. The city has no right to them: the 'Guardians of the poor' is a body which does not exist, and the loan-holders, having acquiesced in their payment for eleven years, are presumed to have yielded their right forever. *But they yielded it to the State for the public benefit and not to the treasurer for his private emolument.*" (Com. *v.* Philadelphia, 27 Penn. St., 501, 502.) In an earlier case in the same State the same doctrine was applied *against the surety* of a collector. (Moore *v.* Allegheny, 18 Penn. St., 55.) In the course of the opinion it is remarked (page 58, near bottom) that, "possessing the right to levy and collect a tax for city purposes from persons and property, a mistake of the class of persons or the species of property subject to it will not amount to usurpation"; *i. e.*, will not make their collection an extra-official act.

In a case in Tennessee the court, after mentioning that a collector is not liable for failure to collect on an insufficient warrant, said: "But the rule is very different where the sheriff or collector has actually received public revenue either under an invalid authority, or *without any color of authority*. In such case, neither he *nor his sureties* can be heard to resist a recovery of the money thus received, on the ground of want of proper authority to receive it." (Governor *vs.* Montgomery, 2 Swan, 618, citing Same *vs.* Scanland, 6 Humph., 195.)

In an early case in Maine a collector and his sureties defended upon the ground that the taxes were illegally assessed, and consequently no taxes; that the sums paid by the tax-payers, not being lawfully exacted, constituted no part of the public revenue for which the collector was bound to account. While conceding the invalidity of the assessment, the court denied that this constituted any defense so far as concerned the amount actually received. "For in this action the obligors are all bound by their own bond, sureties as well as principal, for the fidelity of Clough; but the sureties would not be answerable to those from whom he exacted the payment of taxes without legal authority. No facts appear on the report tending to show that they were not all voluntarily paid to the collector; nor have we any ground for presuming that any of those who have paid their taxes to him would ever think of attempting to reclaim the moneys so paid." (Ford *vs.* Clough, 8 Maine, 342.)

In a later case the same court said: "The collector must then be regarded as having lists of assessments not in legal form put into his hands to collect, and without any warrant for so doing. Yet he has collected portions of the taxes on such lists, and has not paid over the

money to the treasurer. *This money is not his own*; he does not prove that it was received under such a mistake of *fact*, or in such a compulsory manner, that he is obliged to return it to those from whom he received it. The argument is that it might have been so received, but the court can act only upon proof. *The money was collected by him in his official character, and in that character he holds it.*" (Johnson *vs.* Goodridge, 15 Maine, 31, 32.)

The supreme court of Massachusetts, in 1860, used similar language with regard to the official duty of an officer to turn into the public treasury money paid to him upon void warrants, which the parties against whom they ran did not seek to invalidate; "but yielding to their authority, and to that of the deputy sheriff claiming to exercise them under color of his office, they paid the sums demanded of them by him. *This money was received by him, not as a private person*, nor by virtue of any contract or arrangement between him and the collector or tax-payers, *but it came into his hands solely as a deputy sheriff*, claiming authority to act under the power with which he was clothed by law. *In all this he acted officially, not personally; as the deputy of the defendant, and not individually.*" (Williamstown *vs.* Willis, 15 Gray, 430.) In that case, as in this, the taxes were legally collectible, though no particular formal warrants had issued; and they were collectible by him who received them; but, aside from his official position, any other citizen had an equal right to receive them.

It is further to be noticed that in the Maine case first cited the *assessments*, as well as the warrants for their collection, were utterly void. In Maryland, where the principal and *sureties* were sued on such an official bond, and de-

fended upon the ground of the invalidity of the tax, and not of the precept for their collection, the opinion commences thus: "It is admitted by the demurrer in this case that the collector has received all the taxes levied on the assessable property of Montgomery County, the non-payment of which [to the State] furnishes the subject of this suit. Having thus admitted the receipt of this money, the collector, who is in the light of an agent of the State, could not be heard to urge in his defense to a suit that the money he had received was on account of taxes which the legislature had no constitutional power to impose," or had not imposed. (Waters *vs.* State, 1 Gill, 307, 308.)

In a cause decided ten years ago, the same court say that an action for money had and received upon the official bond may be maintained by the party entitled to the fund at his election, and add that "the case of Waters and others *vs.* The State (1 Gill, 302) furnishes a conclusive answer to the objection growing out of the supposed illegality of the tax." (O'Neal *vs.* School Commissioners, 27 Md., 240, paragraphs 3 and 4; State *vs.* Baltimore and Ohio Railroad Company, 34 Md., 365; Placer Co. *vs.* Dickerson, 45 Cal., 12, 14; Sandwich *vs.* Fish, 2 Gray, 301; Wendall *vs.* Fleming, 8 Gray, 616; Trescott *vs.* Moan, 50 Maine, 347; Orono *vs.* Wedgewood, 44 Maine, 49.)

The language of Judge Cooley (from whose work most of these citations were obtained) may be employed, as most clearly indicating the doctrine they establish: "The principles here stated are applicable not merely to the case of a defect in the official authority, but to the case also in which defects, either technical or *substantial*, might have been urged to the tax the officer has enforced. *The substantial fact is that he has received money for the*

State, and, having done so, it is not his privilege to pause and question the right of the State to receive it; but he should pay it over, and leave those from whom it was received to present a claim to the State for the refunding, if they deny its right to retain it." (Cooley on Taxation, 498.) At the bottom of the succeeding page the same author says: "What has been said of the liability of the collector to account for moneys received is as applicable in a suit on any such bond as in a suit for money had and received; he cannot defend by showing that those who voluntarily have paid to him could not legally have been compelled to do so." (*Id.*, 499.)

We will close our argument upon this branch of the cause with the few simple inquiries we should make of a jury. If Mr. Chase received these fees as an officer and in the performance of his duties as collector of internal revenue, would it be faithfulness in the discharge of those duties and in that office for him to take these moneys and put them into his own pocket? Or would such fidelity require him to turn them over to the Treasury of the government in whose behalf (as its officer and agent) he received them? If these funds came into his hands officially during the term covered by this bond, and were by him held in trust for the United States, and their retention was infidelity to his official trust, then his sureties are liable according to the strict letter of their obligation. (United States *vs.* Boyd, 15 Peters, 208.)

II.

As to the taxation of the costs.

Chap. 16 of the Revised Statutes is entitled "Fees." It opens with section 823, declaring that "the following and no other compensation shall be taxed and allowed

to attorneys, solicitors," proctors, "district attorneys, clerks," &c.

The marginal note to section 825 is, "Fees in revenue cases, and in suits on official bonds." That section reads:

"SEC. 825. There shall be *taxed* and paid to every district attorney 2 per centum upon all moneys collected or realized in any suit or proceeding *arising under the revenue laws*, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding."

"SEC. 826. No fee shall accrue to any district attorney on any *bond* left with him for collection, or in a suit commenced on any bond for the renewal of which provision is made by law, unless the party neglects to apply for such renewal for more than twenty days after the maturity of the bond."

From these provisions it is apparent that this fee accrues upon a *bond* given to secure the collection of the revenue; and that it is to be *taxed*, which must be before execution issues, and in making up the costs.

This was a proceeding arising under the revenue laws (Pettigrew *vs.* United States, No. —), of the present term.

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